



## Constitutional implications of The Retained EU Law (Revocation and Reform) Bill.

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### **Abstract**

*The Brexit process is no stranger to attracting considerable political and academic attention, nor is the process short of constitutional controversy. The Retained EU Law (Revocation and Reform) Bill is no exception. The Bill has been a catalyst for discussion across the political and academic spheres, and, if enacted as presented to Parliament by the executive, is on course to have significant constitutional implications. This paper aims to situate the Retained EU Law (Revocation and Reform) Bill within the Brexit legislative framework, and to outline the key contents of the Bill in order to highlight its potential constitutional implications if enacted unamended.*

### **Keywords**

Brexit, Retained EU Law, Delegated Legislation, Parliamentary Scrutiny, Parliamentary Sovereignty, Rule of Law.

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## I. INTRODUCTION

The Retained EU Law (Revocation and Reform) Bill (hereafter, the "REUL Bill"), if passed as introduced to Parliament, would have a profound impact on the United Kingdom ("UK") statute book. The most important and most worrying provision of the unamended REUL Bill is the sunset of secondary retained EU law derived from the UK's membership of the European Union ("EU"). The sunset of retained EU law on 31 December 2023 under the REUL Bill would undermine legal certainty and the rule of law. The REUL Bill, its content and potential impact have already attracted significant academic and political commentary,<sup>1</sup> which is likely to continue for some time to come.

The purpose of this note is to consider the unamended REUL Bill to demonstrate the legislative intent of the executive whilst also highlighting the potential constitutional implications of the Bill. To do so, the note will discuss the legislative background to the REUL Bill and the Brexit landscape which the Bill finds itself. The note will then turn to the content of the Bill. Before concluding with a discussion of the implications of the executive's intended direction of the REUL Bill, with particular emphasis placed upon the undermining of legal certainty, parliamentary sovereignty, and parliamentary accountability.

## II. BACKGROUND

On 23 June 2016, the UK held a referendum on its membership of the EU. The electorate voted by a majority of nearly 52% to leave the EU. Since the result, the UK has through a series of legislative instruments, focused on building a legal framework for its departure and future relationship with the EU. The European Union (Notification of Withdrawal) Act 2017 was the first; the Act responsible for triggering Article 50 of Treaty on European Union. This was followed by two other Acts of Parliament, the European Union (Withdrawal) Act 2018 (hereafter, EUWA 2018) and the European Union (Withdrawal Agreement) Act 2020.

Although not yet an Act, the REUL Bill builds upon the existing Brexit legal framework, particularly the EUWA 2018, which is essentially the precursor to this Bill in that it retained EU law. The EUWA 2018 was an 'Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU', but most importantly, the EUWA 2018 provided legal certainty for the UK's exit from the EU. It did this

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\*The information presented in this note, was accurate at the time of writing (14<sup>th</sup> June 2023). At the point of submission, the Bill was at the consideration of amendments stage and therefore the content of the Bill may have changed before becoming an Act. The analysis provided in this note focuses upon the original Bill as introduced to Parliament.

<sup>1</sup> Joelle Grogan and Catherine Barnard, 'Retained EU Law (Revocation and Reform) Bill' (UK in a changing Europe, 5 January 2023) available: <https://ukandeu.ac.uk/the-retained-eu-law-revocation-and-reform-bill/>; Ruth Fox, '5 Problems with the Retained EU Law (Revocation and Reform) Bill' (Hansard Society, 24 October 2022) available: <https://www.hansardsociety.org.uk/publications/briefings/five-problems-with-the-retained-eu-law-revocation-and-reform-bill/>; Samuel Willis, 'Retained EU Law (Revocation and Reform) Bill second reading briefing' (Public Law Project, 24 October 2022) available: <https://publiclawproject.org.uk/resources/retained-eu-law-revocation-and-reform-bill-second-reading-briefing/>; Regulatory Policy Committee, 'Retained EU Law (Revocation and Reform) Bill' (18 November 2022); Stella Creasy and Archie Hamilton, 'Left and right agree: retained EU law bill is a threat to parliamentary sovereignty' (Labour List, 24<sup>th</sup> May 2023) available: <https://labourlist.org/2023/05/brexit-creasy-remain-both-sides-agree-retained-eu-law-bill-is-a-threat-to-parliamentary-sovereignty/>

primarily by creating 'retained EU law', a new category of domestic law that would remain on the UK statute book until reviewed, reformed, or repealed by Parliament.<sup>2</sup>

The reality, however, when considering the EUWA 2018 and now the REUL Bill, was never that Parliament would review, reform or repeal retained EU law, but that it would empower the executive to do so. Both the EUWA 2018 and the REUL Bill give sweeping powers to the executive at the expense of the legislature. However, the EUWA 2018 (for now) allows EU law to continue to have effect in domestic law on and after exit day<sup>3</sup> as retained EU law.

The RUELE Bill, however, seeks to aggressively intensify the pace at which retained EU law is reviewed, reformed, or repealed, giving the executive considerable discretion. This intensity coupled with the discretion would empower the executive beyond what is necessary, providing an example of executive dominance while potentially undermining constitutional fundamentals. Reversing the legal certainty provided by this bill's precursor, the EUWA 2018.

### III. THE BILL

To achieve its aim 'to amend more easily, repeal and replace retained EU Law', the REUL Bill introduced to Parliament contained the following provisions:

**Clause 1:** sunseting of EU-derived subordinate legislation and retained direct EU legislation;<sup>4</sup> revoking (at the end of 2023)<sup>5</sup> EU-derived subordinate legislation<sup>6</sup> and retained direct EU legislation.<sup>7</sup> 'EU-derived subordinate legislation' means any domestic subordinate legislation made under section 2(2)<sup>8</sup> of the European Communities Act 1972<sup>9</sup> (this section of European Communities Act 1972 concerned delegated legislation, meaning the Bill does not cover primary legislation) and it was made, or operated immediately before Implementation Period (IP) completion day.<sup>10</sup>

**Clause 2:** the extension of the sunset provision (in clause 1).<sup>11</sup> A Minister of the Crown may by regulation extend clause 1,<sup>12</sup> however, they may not specify a time later than the end of 23 June 2026<sup>13</sup> (the 10-year anniversary of the referendum).

**Clause 3:** the sunseting of retained EU rights, powers, liabilities *etc.* Amending section 4 of the EUWA 2018, meaning the saving for rights, powers, liabilities *etc* (under section

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<sup>2</sup> An intention confirmed in the 2022 Queen's Speech, with a Bill enabling the amending of law inherited from the EU. See, Prime Minister's Office, 'Queens Speech 2022' (10 May 2022). Available: <https://www.gov.uk/government/speeches/queens-speech-2022>.

<sup>3</sup> European Union (Withdrawal) Act 2018, sections 2-4.

<sup>4</sup> The Retained EU Law (Revocation and Reform) Bill 2022, clause 1.

<sup>5</sup> Clause 1(1).

<sup>6</sup> Clause 1(1)(a).

<sup>7</sup> Clause 1(1)(b).

<sup>8</sup> Or paragraph 1A of Schedule 2.

<sup>9</sup> Clause 14(a).

<sup>10</sup> Clause 14(b).

<sup>11</sup> Clause 2.

<sup>12</sup> Clause 2(1).

<sup>13</sup> Clause 2(3).

2(1) of the European Communities Act 1972) is repealed at the end of 2023.<sup>14</sup> Therefore, anything that, immediately before the end of 2023, is retained EU law by virtue of that section (section 4 EUWA 2018) is not recognised or available in domestic law at or after that time.<sup>15</sup>

**Clause 4:** abolishes the supremacy of EU law.<sup>16</sup> Meaning that the supremacy of EU law is not part of domestic law. This applies after the end of 2023, in relation to any enactment or rule of law (whenever it was passed or made).<sup>17</sup>

**Clause 5:** witnesses the abolition of general principles of EU law and the amendment of the EUWA 2018,<sup>18</sup> meaning that no general principle of EU law will be part of domestic law after 2023.<sup>19</sup>

**Clause 6:** the creation of 'assimilated law.' After the end of 2023, retained EU law is to be known as "assimilated law."<sup>20</sup>

**Clause 12:** the power to restate retained EU law.<sup>21</sup> This section empowers a relevant national authority by regulation to restate any secondary retained EU law.<sup>22</sup>

**Clause 15:** the power to revoke or replace retained EU law.<sup>23</sup> A relevant national authority may by regulations revoke any secondary retained EU law without replacing it.<sup>24</sup> The relevant national authority may replace the retained EU law with such a provision as the relevant authority considers to be appropriate to achieve "the same or similar objectives."<sup>25</sup>

**Clause 16:** the Power to update.<sup>26</sup> A relevant national authority may by regulations make such modifications of any secondary retained EU law that the relevant national authority

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<sup>14</sup> Clause 3(1).

<sup>15</sup> Clause 3(2).

<sup>16</sup> Clause 4.

<sup>17</sup> Clause 4(A1).

<sup>18</sup> Clause 5(1).

<sup>19</sup> Clause 5(2).

<sup>20</sup> Clause 6.

<sup>21</sup> Clause 12.

<sup>22</sup> Clause 12(1).

<sup>23</sup> Clause 15.

<sup>24</sup> Clause 15(1).

<sup>25</sup> Clause 15(2).

<sup>26</sup> Clause 16.

considers appropriate to take account of,<sup>27</sup> changes in technology,<sup>28</sup> or developments in scientific understanding.<sup>29</sup>

The REUL Bill if enacted as it was originally introduced to Parliament would have witnessed the ending of all retained EU law that was created under the EUWA 2018. The fundamental element of the Bill is clause 1, its sunset mechanism, which paved the way for all retained EU law to end. The sunset provision would have essentially revoked all retained EU law at the end of 2023, unless the retained law was expressly retained, or the sunset provision extended.

These provisions mean that not only are ministers empowered to decide which retained laws are saved or revoked, they are also empowered to extend the sunset provision to 2026. This means there is not even clarity on the sunset element of the Bill (which was one of the most important components of this Bill).

There are some exceptions to the Bill's provisions. Namely, it does not cover primary legislation or legislation that concerns financial services, tax, and customs. There is also a commitment to saving legislation that is required for international obligations.<sup>30</sup> However, overwhelmingly, the REUL Bill illustrates the Government's approach being one of hurtling towards a cliff edge for retained EU law. A concerning approach and one that clearly aligns with the presence of executive dominance within the British constitution.<sup>31</sup>

#### IV. CONSTITUTIONAL IMPLICATIONS

The key focus of this note is upon the undermining of the rule of law, the implications of the Bill upon which are primarily due to the Bill's undermining of legal certainty. The EUWA 2018 instilled 'continuity', avoided a 'legal vacuum,' and provided legal certainty after exit day. This was achieved by taking a snapshot of the existing body of EU law as it was on exit day and converting it into domestic law. The REUL Bill would undermine the legal certainty instilled by the EUWA 2018, removing any confidence of which retained law will be kept, repealed, or replaced and when. The House of Lords Delegated Powers and Regulatory Reform Committee (DPRR Committee) has acknowledged that the Bill signals a significant departure from the legal certainty instilled up to this point and a lacking role for Parliamentarians.<sup>32</sup> One of the ways the original REUL Bill would have undermined the legal certainty instilled by the EUWA 2018 is via the sunseting of retained EU law under clause 1 of the REUL Bill by the end of 2023. There is nothing within the original Bill which gives any indication as to which retained law may be amended, repealed, or replaced. The constitutional implications of this clause and the legal

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<sup>27</sup> Clause 16(1).

<sup>28</sup> Clause 16(1)(a).

<sup>29</sup> Clause 16(1)(b).

<sup>30</sup> Which may witness the saving of some employment and environmental law. Joelle Grogan and Catherine Barnard, 'Retained EU Law (Revocation and Reform) Bill' (UK in a changing Europe, 5 January 2023). Available: <https://ukandeu.ac.uk/the-retained-eu-law-revocation-and-reform-bill/>.

<sup>31</sup> Executive dominance is the executive's power to control, impede or perform the role of another branch of the constitution. See Jake Hinks, *Executive Dominance and the British Constitution* (PhD Thesis, Aston University 2023).

<sup>32</sup> Delegated Powers and Regulatory Reform Committee, *Twenty Fifth Report Retained EU Law (Revocation and Reform) Bill* (HL 2022-23 147).

vacuum it would have created are acknowledged in amendment 1 by the House of Lords, which removes the sunset provision,<sup>33</sup> an amendment accepted by the Commons.

The width of the powers within the original Bill, namely clause 1 concerning the sunset provision, clause 2 the extension of such provision and also clause 5 concerning general principles of EU law eradicate the ability for any certainty or predictability. The uncertainty the REUL Bill creates legally, undermines the rule of law, particularly Bingham's first principle – 'the law must be accessible, intelligible, clear and predictable'.<sup>34</sup>

The inability of Ministers to state with any certainty the number of EU laws covered by the Bill is a perfect illustration of the uncertainty created by this Bill. The original figure of 2,400<sup>35</sup> retained EU laws has been revised to 3,800.<sup>36</sup> The issue of legal certainty is exacerbated by the speed with which the REUL Bill proposes to make these significant changes, and this is one of the reasons why the REUL Bill, as introduced to Parliament, has received criticisms.<sup>37</sup> The British Chambers of Commerce called for the bill's intense deadline to be reviewed and pushed back to 2026 after a survey of its members found that only 4 per cent said they fully understood the Retained EU Law Bill.<sup>38</sup> Furthermore, unless the laws under this Bill are replaced, the UK statute book is on course for numerous significant black holes, exacerbating the Bill's undermining of the rule of law.

The Bill, the Explanatory Notes nor the Memorandum assist in instilling legal certainty, none offer any explanation or indication regarding how Ministers propose to exercise the powers given to them under the Bill. Nor do they contain any suggestion of the Government's intention as to which policy areas are likely to be retained, amended, or revoked.<sup>39</sup>

In addition to the clear rule of law implications, the REUL Bill if enacted as outlined above could have significant implications for parliamentary sovereignty and parliamentary accountability. These implications stem from the nature of the powers within the bill<sup>40</sup> coupled with the lacking parliamentary oversight and scrutiny afforded by the bill. Despite the extent of the powers within the bill, they have not been justified by the Government.<sup>41</sup> The Bill as introduced negates the role of MPs in the decision-making process and represents a wholesale transfer of power to the executive,<sup>42</sup> via the vast delegation of powers, at the expense of the legislature. This empowerment of the executive at the expense of the legislature calls into question both parliamentary sovereignty and parliamentary accountability.

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<sup>33</sup> Replacing it with a list of legislation (subordinate and retained direct EU legislation) listed in schedule that will be revoked at the end of 2023. See HL Bill 143 Commons Disagreements, Commons Reasons and Amendments to Lords Amendments (25 May 2023).

<sup>34</sup> Thomas Bingham, *The Rule of Law* (Penguin, 2011) 37.

<sup>35</sup> Cabinet Office, 'Retained EU Law Dashboard' (22 June 2022).

<sup>36</sup> HC Debate 22 November 2022, Retained EU Law (Revocation and Reform) Bill (Third Sitting).

<sup>37</sup> BBC, 'Brexit: Don't scrap EU Rules, firms and unions say' (24<sup>th</sup> November 2022) available: [https://www.bbc.co.uk/news/business-63741465?at\\_medium=RSS](https://www.bbc.co.uk/news/business-63741465?at_medium=RSS); Aimee Meade, 'Rishi Sunak should start a bonfire of the EU law bill – Jacob Rees-Mogg's vanity project' (The I, 17 January 2023) available: <https://www.msn.com/en-gb/news/world/rishi-sunak-should-start-a-bonfire-of-the-eu-law-bill-jacob-rees-mogg-s-vanity-project/ar-AA16rFVG>; Ruth Fox, '5 Problems with the Retained EU Law (Revocation and Reform) Bill (Hansard Society, 24 October 2022) available: <https://www.hansardsociety.org.uk/publications/briefings/five-problems-with-the-retained-eu-law-revocation-and-reform-bill>.

<sup>38</sup> British Chamber Commerce, 'Large- scale deregulation not a priority for UK businesses' (29 November 2022). Available: <https://www.britishchambers.org.uk/news/2022/11/large-scale-deregulation-not-a-priority-for-uk-businesses>.

<sup>39</sup> Delegated Powers and Regulatory Reform Committee, *Twenty Fifth Report Retained EU Law (Revocation and Reform) Bill* (HL 2022-23 147) 17.

<sup>40</sup> particularly clauses 1,2,3,5,12 and 15.

<sup>41</sup> Delegated Powers and Regulatory Reform Committee, *Twenty Fifth Report Retained EU Law (Revocation and Reform) Bill* (HL 2022-23 147) 18.

<sup>42</sup> Stella Creasy and Archie Hamilton, 'Left and right agree: retained EU law bill is a threat to parliamentary sovereignty' (Labour List, 24<sup>th</sup> May 2023). Available: <https://labourlist.org/2023/05/brexit-creasy-remain-both-sides-agree-retained-eu-law-bill-is-a-threat-to-parliamentary-sovereignty/>.

## V. CONCLUSION

The impact of the REUL Bill cannot be understated. If the Bill was passed as it was introduced to Parliament, it would have had profound consequences not only for the UK statute book, but also for the British constitution undermining the rule of law and parliamentary accountability. The Bill as it stands is set to potentially leave considerable black holes in the UK statute book, reversing the legal certainty instilled by the EUWA 2018, leaving the public, industry, public bodies, and everyone in between second guessing the potential implications and legal landscape. Not only that, but the Bill is creating this legal uncertainty whilst excessively empowering the executive beyond that which is necessary, at the expense of constitutional fundamentals.

The lack of parliamentary accountability is astonishing when considering the mammoth task undertaken by the executive through the powers granted in the REUL Bill, the amending, repealing, or replacing of nearly 4,000 retained EU laws. The problematic nature of the lack of accountability is exacerbated when considering the areas of law impacted by this Bill.

The Bill has now completed all stages in both Houses and the final text is likely to continue changing during the current parliamentary ping-pong and consideration of amendments stage. However, it has been the intention of this note to highlight the executive's legislative approach, therefore vital to analyse the unamended Bill. It will therefore be interesting to see if the executive is successful in any of its attempted power grabs and whether the House of Lords are able to do what the House of Commons have not; namely protect the constitutional fundamentals of the British constitution and through amendments, instil legal certainty, protect parliamentary sovereignty whilst increasing parliamentary accountability.